United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2049

To be argued by
HOWARD S. SUSSMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2049

UNITED STATES OF AMERICA,

Appellee,

—v.—

PUI LEONG LAM,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

HOWARD S. SUSSMAN,
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Preliminary Statement

Pui Leong Lam appeals from a judgment of conviction entered on June 27, 1974, in the United States District Court for the Southern District of New York, after a trial before the Honorable Frederick van Pelt Bryan, United States District Judge, sitting without a jury.

Indictment 74 Cr. 312, filed on March 28, 1974, charged appellant, Pui Leong Lam, and his brother, Pui Kan Lam, in two counts with violation of the federal narcotics laws. The first count charged the defendants with conspiracy to violate the federal narcotics laws during the period between January 1, 1972, and August 22, 1972, in violation of Title 21, United States Code, Section 846. The second count charged appellant with aiding and abetting the distribution of a pound of heroin on May 18, 1972, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.

Trial commenced as to appellant * on May 7, 1974, and concluded on May 9, 1974. Judge Bryan found appellant guilty on the first count and not guilty on the second count of the indictment.

On June 27, 1974, Judge Bryan sentenced appellant to a term of imprisonment of eight years and six months to run concurrently with appellant's ten-year sentence imposed by the late Judge Rosling in the United States District Court for the Eastern District of New York upon appellant's previous conviction for violation of the federal narcotics laws,** and to be followed by a term of three years special parole. Judge Bryan thereafter reduced appellant's sentence to eight years imprisonment to run concurrently with his previous sentence so that his confinement under both sentences would expire at the same time with a term of three years special parole to follow.

Appellant is presently serving his sentences.

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* The charges against appellant's brother, Pui Kan Lam, were dismissed prior to trial.

** Appellant's conviction in the Eastern District was affirmed by this Court. See *United States* v. *Pui Kan Lam*, 483 F.2d 1202 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974).

Statement of Facts

The Government's Case

1. Introduction

The proof at trial focused on the sale and distribution of four pounds of heroin, the source of which was appellant and his two brothers. The evidence showed that during latter part of April, 1972 appellant delivered the four pounds of heroin to one Guan Chow Tok, also known as "Woo Gai Check" and "Woo Gai Sheck," ("Tok") who, acting on appellant's behalf, sold the narcotics to one Tim Lok ("Lok") for resale to an unidentified purchaser.

Lok paid Tok $15,000 for three pounds of this heroin, but returned the fourth pound to Tok. Thereafter, on May 18, 1972, Tok sold the pound of heroin returned by Lok to undercover agent Lowery Leong of the Drug Enforcement Administration ("Agent Leong"). The sale to Agent Leong was arranged through a DEA informant named Chun Yin Chiu ("Chiu"), also known as "Sandy," who, like Tok, testified for the prosecution at the trial below.

2. The Events Prior to May 3, 1972

Chiu and Tok became friends after meeting in 1970 in a gambling house where Tok then worked (Tr. 64-66).* In August 1970, Tok opened a sportswear factory on Canal Street in Manhattan, borrowing $2000 from his friend Young to finance the business (Tr. 66-67, 121-122). Chiu testified that at about this time he began buying heroin from Tok for his own use and continued to do so until the spring of 1971 (Tr. 67-68). He stopped buying heroin

* "Tr." refers to the trial transcript; "Br." to appellant's brief.

from Tok until January 1972, but thereafter resumed doing so until his arrest in February 1972 (Tr. 68-69). Tok admitted obtaining heroin for Chiu from Young to enable Chiu to work better for him (Tr. 125-127).

Sometime in early 1972, appellant, whom Tok had met previously, approached Tok to collect the $2000, which Tok owed Young and which Young then needed in order to make bail (Tr. 122-124). Tok gave appellant $1500 (Tr. 123).

Thereafter, on or about April 20, 1972, appellant again visited Tok at the latter's factory on Canal Street and told him that he had six pounds of heroin available for sale at $5000 per pound.* Appellant asked Tok whether he could find a buyer for the drugs. Tok said he would try (Tr. 124-128).

Tok sought the assistance of Lok who found an unidentified buyer for the four pounds of heroin (Tr. 128-130). During the latter part of April, 1972, appellant, accompanied by his two brothers, delivered the four pounds of heroin to Tok on Essex Street in Manhattan (Tr. 131-135). Tok testified that on the day the narcotics were delivered, appellant approached him while he waited in his car. After a brief conversation, Tok observed appellant's two brothers, one of whom was carrying a package, turn the corner of the street and walk toward appellant. Appellant and the brother carrying the package (the "middle brother") walked to Tok's car while appellant's youngest brother, Pui Kan Lam, stood on the street some distance away. Appellant introduced the man to Tok as one of his brothers. At appellant's instruction, the middle

* Appellant told Tok that the heroin had gotten wet aboard the ship in which it had been transported and therefore was not of good quality (Tr. 127).

brother handed the package to Tok. Within a half hour, Tok delivered the package containing the four pounds of heroin to Lok (Tr. 135).

During the week between May 3 and May 10, Lok paid Tok $10,000 in partial payment for the four pounds of heroin previously delivered to Lok. Tok later turned over the $10,000 to appellant and his middle brother at Tok's house (Tr. 136-38, 152). Shortly thereafter, Lok paid Tok an additional $5000. He also returned to Tok one of the four pounds of heroin previously delivered. Tok took this pound of heroin to his factory and hid it beside a staircase (Tr. 154-157). As described *infra*, Tok sold this pound of heroin to Agent Leong on May 18 for $8000.

On May 2, 1972, Chiu, who was then serving as a DEA informant, met Tok at the Sun Sing Theater on East Broadway, Manhattan, and asked Tok if he had any drugs for sale (Tr. 73, 139-141). On the following day, Tok informed Chiu that he had drugs available (Tr. 73-74), but that Chiu would have to buy a pound, not just an ounce (Tr. 140-141). Chiu replied that he would have to find a buyer for so large a quantity. Tok then called appellant who said the prospective buyer could inspect the heroin (Tr. 142). Tok then located Chiu in Chinatown, asked him to bring the buyer over and arranged a meeting for the evening of May 3 (Tr. 74-75, 142-144). Tok also told Chiu that the heroin was from the Lam brothers (Tr. 78-79).

3. The Meetings of May 3, 1972

On May 3, 1972 Chiu, in Agent Leong's presence, telephoned Tok and arranged to meet that evening (Tr. 12-13, 74-75). At about 7:00 p.m., Agent Leong and Chiu drove in Chiu's car to Tok's residence at 173 Henry Street, Manhattan, where they met Tok (Tr. 14-16, 75, 144). Tok assured himself that Agent Leong had the necessary money

(Tr. 18-19, 144-145); Agent Leong and Chiu then waited in Chiu's car for the people with the heroin to arrive (Tr. 22-23).

Sometime later, Agent Leong observed appellant and one of his brothers approach Tok's car and enter it (Tr. 25-26, 76, 145). Agent Leong and Chiu walked over and did likewise (Tr. 26, 76, 147-46). During this meeting in Tok's car, which lasted between five and ten minutes, appellant and Tok sat in the front seat with Tok behind the wheel; Agent Leong, Chiu and appellant's brother sat in the rear seat with Agent Leong behind Tok, thus giving Agent Leong a clear view of appellant (Tr. 26, 29, 34-37, 50-51, 146).

Agent Leong began the discussion in the car by immediately asking for heroin (Tr. 27, 76, 146). This led to a conversation between Tok and appellant conducted in a Chinese dialect known as Swatow, which neither Chiu nor Agent Leong could fully understand. Tok testified that during this conversation he and appellant expressed their mutual concern that Leong's unguarded question meant something was wrong (Tr. 27-28, 77, 146-148). Tok told Agent Leong that they did not have the drugs. When Agent Leong overheard part of the conversation between Tok and appellant spoken in Cantonese in which the latter said that he wanted the money for the heroin in advance, Agent Leong responded that he would not produce the money until he saw the drugs (Tr. 28-30, 77-78). Agent Leong directed Chiu to advise the others to get in touch with Chiu if they ever obtained the pound of heroin, after which Agent Leong and Chiu left the car (Tr. 30-33, 78, 148-149).

After the May 3 meetings, Agent Leong went to San Francisco, where he was regularly assigned, and remained there until May 18 (Tr. 11, 38). He returned to New York on that day and purchased for $8,000 the pound of heroin which Lok had returned to Tok.

4. The Meeting and Purchase of May 18

Upon arriving in New York on May 18, Agent Leong directed Chiu to set up another meeting with Tok who, three days earlier, had told Chiu that he was still interested in selling a pound of heroin (Tr. 37-39, 84-85, 154, 157-158). Chiu did so, and he and Agent Leong drove to Tok's residence at 173 Henry Street that evening (Tr. 39, 86). Unable to find Tok at his apartment, they then proceeded part of the way to Tok's factory, but decided to return to Henry Street (Tr. 39-40, 86-87). After waiting there a while, Chiu went up to Tok's apartment alone, and returned to advise Agent Leong that the h n was at Tok's factory, to which they then went following Tok in his car (Tr. 40-41, 87-88, 158). Once there, after some preliminary discussion, the three of them ascended the stairs (Tr. 41-42, 159). Tok removed a brown paper bag containing 481.6 grams of heroin (72.5% pure) (Tr. 191) from the wall near the stairs and handed it to Chiu, who handed it to Agent Leong; Agent Leong, in turn, paid Tok $8000 (Tr. 43, 88-89, 159-160, 190-91) Agent Leong and Chiu then left (Tr. 43, 89, 160).

5. Events after the May 18 Purchase

Of the $8,000 Leong paid him, Tok gave $5,000 to appellant, $2,000 to Chiu, and split the remaining $1,000 evenly with Lok (Tr. 160-161, 89). Chiu, without telling Agent Leong, then purchased an ounce of heroin from Tok for $600 (Tr. 89-90). Once again, Tok told Chiu that the heroin came from Lam (Tr. 90).

The Defense Case

Gerald Provost, an inmate at the Federal Detention Headquarters at West Street, testified that on May 4, 1974 he overheard a conversation, largely in Chinese, among Tok, Chiu and another inmate named Herman Max Ruth in which Tok allegedly denied that he had ever dealt in

herein with appellant or his youngest brother, Pui Kan Lam (Tr. 194-198). Provost admitted that he did not speak Chinese (Tr. 198).

The defendant also offered certain stipulated testimony of DEA Agents Robert E. Allen and John B. Falvey who had conducted surveillance during the course of the investigation (Tr. 204-206).

ARGUMENT

POINT I

The evidence of appellant's guilt was overwhelming.

Appellant claims that the evidence was insufficient to establish his guilt because the testimony of the Government's witnesses was not believable. The argument is frivolous.

The short and dispositive answer to the list of complaints (Br. 4-10) about the credibility of Tok, Chiu and Agent Leong is that the determination of this question was exclusively within the province of Judge Bryan, sitting as the trier of the facts, and is not subject to re-examination by this Court. *United States* v. *McGuire*, 381 F.2d 306, 315 (2d Cir. 1967), *cert. denied*, 389 U.S. 1053 (1968); see *United States* v. *Mallah*, Dkt. No. 74-1327 (2d Cir., September 23, 1974), slip op. 5475 at 5489; *United States* v. *Brown*, 335 F.2d 170, 172 (2d Cir. 1964).

POINT II

The indictment was not defective.

The indictment alleged a conspiracy beginning on January 1, 1972 and continuing until August 22, 1972. Appellant claims that the conspiracy count was defective, since he was in jail on other charges from the end of June, 1972. The argument is without merit.

It is beyond dispute that the Government need not prove that a conspiracy started or ended on the dates specified in the indictment. It is sufficient if the evidence shows that the conspiracy existed for some time within the period set forth in the indictment. *United States* v. *Postma*, 242 F.2d 488, 497 (2d Cir.), *cert. denied*, 354 U.S. 922 (1957); *United States* v. *Houlihan*, 332 F.2d 8, 14 (2d Cir.), *cert. denied*, 379 U.S. 828 (1964); *Arnold* v. *United States*, 336 F.2d 347, 353 (9th Cir. 1964), *cert. denied*, 380 U.S. 982 (1965). Furthermore, the proof need not show that the defendant was a member of the conspiracy throughout the life of the conspiracy or throughout the period charged in the indictment.

Here the proof indisputably established that the conspiracy existed during April and May 1972 *i.e.*, within the period charged in the indictment, and "[t]here was substantial evidence of [appellant's] participation in the conspiracy prior to his incarceration . . . ." *United States* v. *Agueci*, 310 F.2d 817, 839 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). Assuming *arguendo* that appellant's incarceration in June, it is clear that this occurred well after the conspiracy itself had ceased active operation.

POINT III

Appellant was not denied his right to a speedy trial.

Appellant was indicted on March 28, 1974, some twenty-two months after the events underlying this case occurred. He now claims that his right to a speedy trial was therefore infringed. There is no merit to the argument.

Appellant does not claim that he has suffered any prejudice as a result of the delay and none appears from the record. Appellant completely fails to demonstrate that his right to a speedy trial under the Sixth Amendment or Rule 48(b) or his Fifth Amendment right to due process was violated. *United States* v. *Marion*, 404 U.S. 307 (1971); *United States* v. *Mallah*, *supra*, slip op. at 5506; *United States* v. *Iannelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972). There is nothing in the record which even remotely supports appellant's speculation (Br. at 12) that the delay was attributable to prosecutorial harassment of appellant and his brothers. *United States* v. *Mallah*, *supra* at 5506.

Finally, since this claim was not raised below, it cannot be raised on this appeal. Rule 12(b)(2), Fed. R. Crim. P.; see *e.g.*, *United States* v. *Garnes*, 156 F. Supp. 467, 470 (S.D.N.Y. 1957), *aff'd*, 258 F.2d 530, 534 (2d Cir. 1958), *cert. denied*, 359 U.S. 937 (1959).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LAWRENCE S. FELD, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the **14th** day of **November, 1974** he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

DAVID NEUBAUER, ESQ.
25 Broadway
New York, N. Y. 10004

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Lawrence S. Feld

Sworn to before me this

14th day of **November, 1974**

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
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Qualified in Kings County
Certificate filed in New York County
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